

**United States Department of Labor
Employees' Compensation Appeals Board**

W.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Milwaukee, WI, Employer**

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**Docket No. 16-1530
Issued: March 1, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2016 appellant filed a timely appeal from a June 22, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained more than three percent permanent impairment of the right upper extremity for which he previously received a schedule award.

FACTUAL HISTORY

On August 1, 2013 appellant, then a 55-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed bicipital tenosynovitis as a result of loading his mail truck. OWCP accepted the claim for bilateral bicipital tenosynovitis and right

¹ 5 U.S.C. § 8101 *et seq.*

complete rotator cuff rupture. Appellant stopped work intermittently and received medical and wage-loss compensation. He sought treatment with Dr. R. Sean Churchill, a Board-certified orthopedic surgeon, and underwent right shoulder rotator cuff repair on April 16, 2015. Appellant was released to work with restrictions on November 16, 2015 and released to work without restrictions on December 7, 2015.

In an October 30, 2015 narrative report, Dr. Churchill reported that appellant had not reached maximum medical improvement (MMI) and thus, no final impairment rating could be obtained.

On December 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated December 21, 2015, OWCP requested that Dr. Churchill submit a report addressing appellant's work-related conditions, the date of MMI, objective findings, subjective complaints, and an impairment rating rendered according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*).²

In a January 1, 2016 report, Dr. Churchill responded to OWCP's development letter stating that appellant had reached MMI on December 14, 2015. He explained that this was the date of his last examination, he was eight months out from surgery, and he had returned to work with no restrictions. Dr. Churchill reported that eight months prior appellant had a diagnostic arthroscopy of his right shoulder with acromioplasty and one centimeter supraspinatus rotator cuff repair. At the time of his last evaluation, he showed forward elevation to 140 degrees, external rotation to the side 40 degrees, and internal rotation up the back to the level of L5 compared with T10 on the contralateral side. Dr. Churchill noted motor examination as 5-/5 for deltoid, external rotator, and subscapularis, as well as abduction at 4+/5. He reported that appellant's examination revealed loss of motion, continued discomfort, and loss of maximal power and endurance. Dr. Churchill opined that appellant sustained 15 percent permanent impairment. He explained that five percent was due to loss of motion, five percent for continued discomfort, and five percent for loss of maximal power and endurance.

On March 30, 2016 OWCP routed Dr. Churchill's report, a statement of accepted facts (SOAF), and the case file to Dr. Nelson Saldua, Board-certified in orthopedic surgery serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained any permanent impairment of the right upper extremity and date of MMI.

In an April 8, 2016 report, Dr. Saldua reported that appellant reached MMI on December 14, 2015 when his symptoms and physical examination had nearly normalized. Utilizing the sixth edition of the A.M.A., *Guides*, he provided a diagnosis of a rotator cuff injury, partial thickness class 1 diagnosis, noting that review of the operative note showed this was a partial thickness tear.³ Dr. Saldua noted that per the most recent notes, appellant had a "residual loss," which has a midrange default of three percent upper extremity impairment. He assigned a grade modifier of 1 for functional history due to ongoing discomfort and a grade modifier of 1

² A.M.A., *Guides* (2009).

³ *Id.*

for physical examination due to loss of range of motion (ROM), continued discomfort, and loss of power/endurance. Dr. Saldua reported that a clinical studies grade modifier was not applicable. The DMA utilized the net adjustment formula and determined that class 1 grade C yielded a total of three percent upper extremity permanent impairment.

Dr. Saldua noted that Dr. Churchill's examination was significant for forward flexion of 140, external rotation of 40, and internal rotation to L5, as well as abduction strength of 4+/5. With respect to Dr. Churchill's impairment rating, Dr. Saldua explained that it did not appear that the physician had properly utilized the A.M.A., *Guides* as all of the impairment calculations were based on loss of ROM, subjective complaints, and loss of power/endurance.

By decision dated June 22, 2016, OWCP granted appellant a schedule award for three percent permanent impairment of the right upper extremity. The date of MMI was noted as February 14, 2015. The award covered a period of 9.36 weeks from December 14, 2015 through February 17, 2016.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁴ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁵ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁶

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled, "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷ The Board has approved the use by OWCP of the A.M.A.,

⁴ See 20 C.F.R. §§ 1.1-1.4.

⁵ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁶ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.⁹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁰ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹¹

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 22, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds that this case is not in posture for a decision.

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁰ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹¹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board